

Virginia Housing Commission: Common Interest Communities Work Group

11/14/2006 - Comments submitted by Chris Casey - info@freemontclair.us

According to the Community Associations Institute, *more than 500,000 Virginians live under Property Owner's Associations in the Commonwealth of Virginia, and five out of six new communities developed are association managed.*

Holidays

Halloween has recently passed. Homes in my neighborhood were decorated with tombstones in their yards, and ghosts hanging in trees. Soon Christmas decorations will start to appear. Some homes may have elaborate winter displays, while others will have nativity scenes. Regardless of whether everybody in our community chooses to celebrate these holidays or not, they are annual events that are important to those who participate, and are tolerated by those who do not.

My community's covenants 'pre-approve' holiday decorations, and do not specify which holidays one can choose to decorate their home. Just don't try putting a political sign in your yard before Election Day.

Section 5.4.7 - Decorative Objects - Pre-Approved

Holiday decorations, not permanently attached to the dwelling. Holiday decorations must be removed within two weeks after the end of the holiday.

Article 5, MPOA Community Guidelines

I admit to some mischievousness last Christmas, when I adorned my yard with two signs reading 'Vote for Santa' and 'We're for Frosty'. I was told that some members of my community's Board wanted to charge me with violating the prohibition against political signs, but others pointed out these were fictional characters and so were acceptable Holiday decorations.

Why are we able to tolerate Holiday decorations of all sorts, but participation in our Democracy through the act of a political sign in my yard prior to Election Day is so intolerable that it must be prohibited by our POA's covenants?



Community Voting

What if you put the question of political signs to a vote, and a majority of your neighbors support the continuation of the prohibition?

The might of a majority does not always make them right. Our history is full of examples unjust laws and efforts by a majority to deny rights of a minority. Jim Crow laws intended to suppress voting by minorities, or restrictive covenants that prohibited members of a particular race, religion, or nationality from living in a community are just a few examples of majorities attacking the rights of a minority. The desire of a majority of Montclairians for a sign-free aesthetic ideal, should not outweigh the free speech rights and participation in our political process by a minority.

I find this particular quote particularly relevant to the question:

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

Justice Robert H. Jackson
Opinion for the Court in *West Virginia Board of Education v. Barnette*
319 U.S. 624 (1943)

Flags & Political Signs

As you know, a recent federal law protects the rights of homeowner's who live under the governance of POA's to display an American flag on their home. In an article that appeared in the Potomac News on July 29th of this year, the President of my Association's Board, Doug Taggart is quoted saying "*I think it is a good law*". In the same article, Thomas Skiba, the Chief Executive Officer of the Community Associations Institute is quoted as saying,

"We commend Mr. Bartlett and his colleagues for taking a logical, balanced approach to what can be a contentious issue"

"This legislation codifies the right of the residents to fly the flag but also affirms the right of the community associations to establish fair and reasonable limitations on how the flag is displayed."

Yet when he appeared before this working group last September to speak in opposition of this legislation, "*For this legislative body to set off on the slippery slope of carving out an exception to the contractually binding Home Owner's Association rules and regulations across this State by allowing for the display of political signs is an inappropriate one in my opinion.*"

On the issue of Political Signs, a paper on CAI's web site states, 'While CAI does not have a formal policy on the display of political signs, we do believe that community associations rules should be adaptable and always in compliance with applicable laws.'

Nevertheless, CAI's lobbyist worked to oppose HR878, to allow similar protections to political signs as they called logical and balanced when it came to flags.

Regardless of whether legislation is used to protect a right to display flags, or restore a form of political speech, each instance 'impairs the obligation' of an existing contract. It's obvious from CAI and Doug Taggart's support of Rep. Bartlett's flag bill that such impairment is an issue that can be overcome.

Contracts & Constitutionality

Opponents of HR878 claim that it is unconstitutional, because of Section 11 of Virginia's Constitution which states...

Section 11. Due process of law; obligation of contracts...

That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts...

But where did the Founding Developers of our Property Owner's Associations find the authority to create contracts which deny Virginian's the rights that our Founding Father's gave us? What other Virginia laws can a POA trump with the contracts they require of those wish to purchase a home in them.

In 1948, the Supreme Court considered the legality of the case of Shelly vs. Kraemer considered the legality of racially restrictive covenants in St. Louis, Missouri which barred "people of the Negro or Mongolian Race" from owning a particular property. The Supreme Court found that the covenants were unenforceable by the courts, as such enforcement would be a state action in violation of the 14th Amendment's guarantee of equal protection.

And what about the Constitutional rights of the homeowners?

Section 12. Freedom of speech and of the press; right peaceably to assemble, and to petition.___

That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.

Section 14. Government should be uniform.___

That the people have a right to uniform government; and, therefore, that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof.

It IS the Public Policy of the Commonwealth to protect the free speech rights of the citizens of the Commonwealth The General Assembly of Virginia has a legitimate public purpose in seeking to return to citizens of Virginia, any free speech rights denied to them as a condition of buying a home.

Ultimately, it may be for the courts to decide where the greater impairment exists; the impairment of a POA's ability to deny free speech, or the impairment of the speech itself. I believe that Virginia's courts are the correct place for such constitutional questions to be answered, rather than seeing this legislation to be pre-determined to be unconstitutional by CAI's lobbyist or a gray cover from the Division of Legislative Services.

This Legislation

There is a very important distinction between these two bills. HB878, which was actively opposed by the Community Associations Institute (CAI), would invalidate any existing prohibitions against the display of a political sign by a POA. While SB621, which was not opposed by CAI, essentially states that you cannot prohibit political signs, unless you prohibit political signs.'

The argument against HB878 is that it would be an unconstitutional retroactive change to an existing contract. But other states have had to deal with this similar dilemma, and found that the violation of the free speech rights of their citizens outweighed concerns for any harm that such a change would cause to a contract.

HB878

Provides that, **notwithstanding any provision in a declaration**, no declaration or association's rules and regulations or architectural guidelines shall restrict or prohibit the display by a lot owner on his lot of a candidate sign or a sign that advertises the support or defeat of any question submitted to the voters in accordance with state election law.

SB621

Provides that, **except as otherwise expressed in the declaration**, no declaration or association's rules and regulations or architectural guidelines shall restrict or prohibit the display by a lot owner on his lot of a candidate sign or a sign that advertises the support or defeat of any question submitted to the voters in accordance with state election law.

Conclusion

Ultimately, the issue at hand is this; Virginians have rights granted to them by Virginia's Constitution. Property Owner's Associations currently can REQUIRE those Virginians who live within the communities they govern to sacrifice some of these rights.

By your recommendation, this working group will either recommend to the full Commission that Virginia's General Assembly take action to restore and protect these rights for the citizens of our Commonwealth, or to allow the community documents of our Founding Developers to trump Virginia's Constitution and create a separate class of Virginians who are denied the rights provided to the rest by our Founding Fathers.